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HAROLD B. WILLEY, Cle

IN THE

Supreme Court of the United States

OCTOBER TERM 1953

No. 491

MYRA PAGE WIREN,
Petitioner,

v.

PARAMOUNT PICTURES, INC.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

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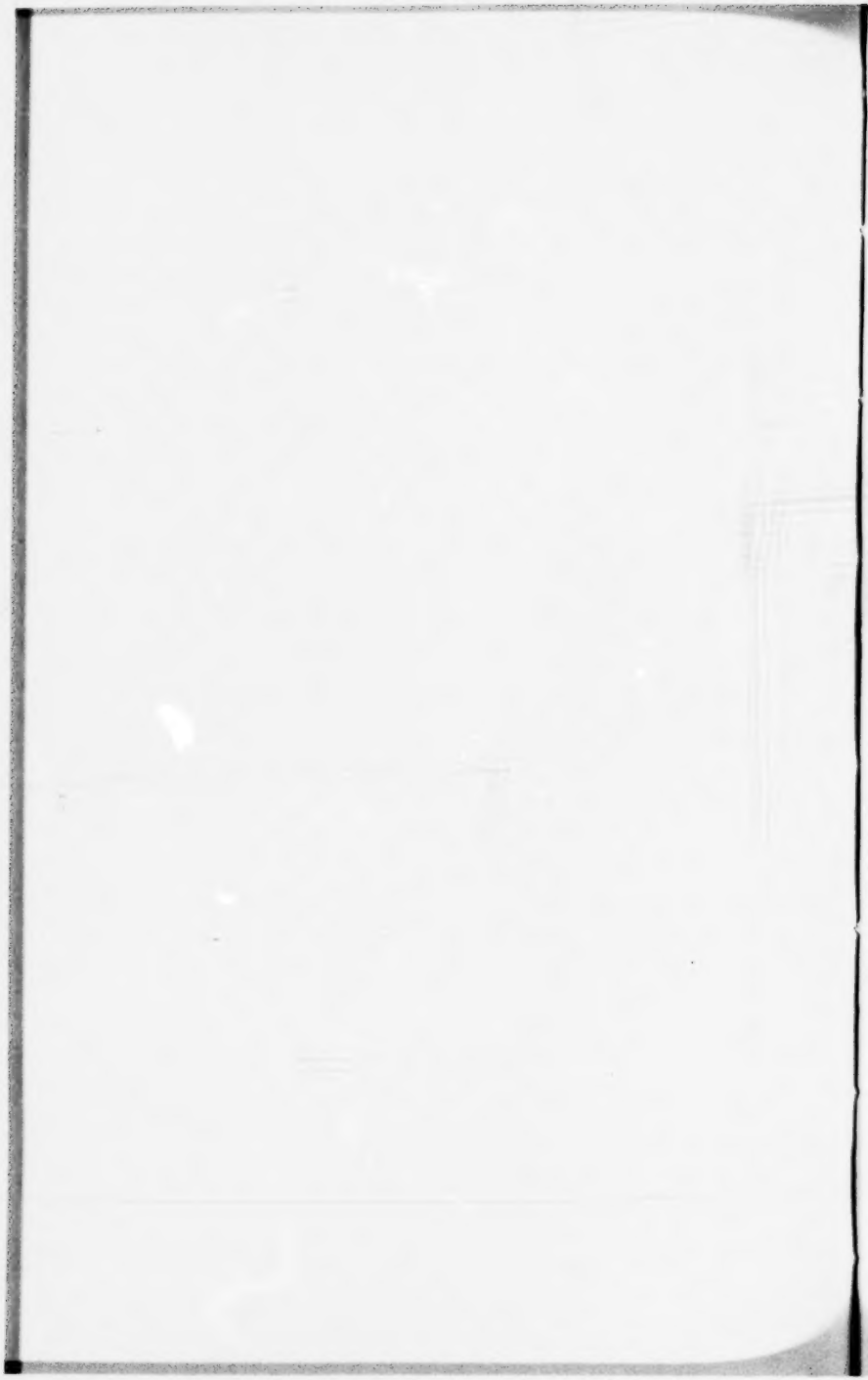

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IN THE

Supreme Court of the United States

OCTOBER TERM 1953

MYRA PAGE WIREN, *Petitioner,* v. PARAMOUNT PICTURES, INC., *Respondent.*	No.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

Myra Page Wiren prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia, affirming an order of the District Court dismissing the complaint of the petitioner filed in the United States District Court for the District of Columbia.

OPINION BELOW

The opinion of the Court of Appeals for the District of Columbia is reported 206 F. 2nd. 465; it is included in the record herein at R. 51-56.

JURISDICTION

The judgment of the Court of Appeals was entered on June 18, 1953 (R. 57), and the order of the Court of

Appeals denying the petition for rehearing was entered on September 11, 1953 (R. 72). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether an independent action in a Federal Court to obtain relief from a prior Federal Court judgment procured through the admitted bribery of the presiding judge should be barred by a local statute of limitations without reference to the Federal equitable doctrine of laches?

2. Whether Rule 15(c) of the Federal Rules of Civil Procedure permits an amendment to a complaint charging the defendants with fraud to be related back to the date of the original complaint where the amendment sets forth conduct of the defendants designed to suppress and continue the frauds alleged to have been committed in the original complaint?

3. Whether an independent action to obtain relief from a judgment procured through fraud upon the court is barred under the doctrine of res judicata by virtue of the denial by the court in which the fraud was practiced of a motion to set aside its earlier decision when it is alleged that the fraud was continued through the proceedings on the motion to set aside?

STATUTE INVOLVED

Title 12, District of Columbia Code, Sect. 201;

> ". . . no action the limitation of which is not otherwise specially prescribed in this section shall be

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brought after three years from the time when the right to maintain such action shall have accrued . . ."

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Rule 15(c) of the Federal Rules of Civil Procedure:

"Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading."

Rule 60(b) of the Federal Rules of Civil Procedure:

"Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered

or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U. S. C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

STATEMENT

On September 28, 1948, petitioner filed her complaint in this proceeding in the United States District Court for the District of Columbia. Since this proceeding has been disposed of in the courts below on the basis of a motion to dismiss addressed to the pleadings, petitioner's statement will attempt to summarize the important allegations contained in her complaint, which for purposes of the motion were to be treated as fact.

Petitioner's complaint was a lengthy one and set forth and described in some detail the circumstances and the fraudulent conduct of the defendants which gave rise to her cause of action. Petitioner alleged that she had authored and copyrighted a dramatic work entitled "Most" from which the play "Death Takes a Holiday" had been plagiarized (R. 2-4). The defendants were charged with having knowingly pirated petitioner's work through the production, exhibition and broadcast of that play (R. 4-7).

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Petitioner then related her earlier efforts to secure redress for those wrongs. She had originally brought an action for plagiarism in the United States District Court for the Southern District of New York which was dismissed in 1933 on a motion for judgment on the pleadings. (*Wiren* v. *Shubert Theatre Corp. et al,* 5 F. Supp. 358; R. 7-11). An appeal to the United States Court of Appeals for the Second Circuit was taken, and that court, with Judge Manton presiding, affirmed the decision of the District Court in May, 1934. (*Wiren* v. *Shubert Theatre Corp.,* 70 F. 2d 1023, certiorari denied 293 U. S. 591; R. 11, 12).

The complaint then alleged that several years after that decision of the Court of Appeals the bribery and corruption of Judge Manton was discovered (R. 13). Following the conviction of Judge Manton, petitioner in April, 1942, made a motion to the Court of Appeals to set aside its earlier affirmance of the decision of the District Court. The motion was heard on affidavits without witnesses or proof and was denied in May, 1942 (R. 13). A petition for certiorari from the decision denying petitioner's motion was denied (R. 13, 14). A second motion was presented to the Court of Appeals in 1945, which motion was denied without opinion in November, 1945 (R. 14).

In her original complaint in this action, which was filed within three years of the filing of the second motion in the Court of Appeals, petitioner set forth at length the fact that Albert D. Lasker, who was responsible for the bribery of Judge Manton and who the Court of Appeals said in its decision on the first motion was only remotely interested in the defendant Paramount, was in fact deeply involved financially in the affairs of Paramount and that he stood to lose large sums of money if the petitioner were success-

ful in her original action for plagiarism (R. 12, 13). Petitioner recited in the complaint facts showing that this evidence did not become available to her until after the finding of the Court of Appeals to the contrary, that she had at all times acted with due diligence, and that immediately after the decision of the Court of Appeals in 1945, she began preparations to start a proceeding based upon the continuous acts of fraud of the defendants (R. 15).

The defendant Paramount filed its answer (R. 21) and thereafter a motion to dismiss (R. 29) urging that the present action was barred by res judicata and by the statute of limitations.

In March, 1950, during a preliminary hearing on defendant's motion to dismiss, the District Court permitted petitioner to amend her complaint by adding paragraph 50 thereto. That paragraph specifically charged that Paramount had actively continued its fraud upon the petitioner and the courts by presenting false affidavits to the Court of Appeals in 1942 and 1945 in opposition to the motions made by the petitioner to the Court of Appeals (the false affidavits dealt with the connection between Lasker and Paramount and between Lasker and Judge Manton) and that as a result of such fraud and false affidavits, had procured decisions favorable to it (R. 17).

In July, 1950, the District Court after hearing argument on defendant's motion to dismiss ordered, *sua sponte* and without request therefor by either side, the case to be transferred to the United States District Court for the Southern District of New York. Petitioner petitioned the United States Court of Appeals for the District of Columbia for a writ of mandamus and that court decided that the order of transfer was erroneous and that the case should proceed in the District of Columbia (*Wiren* v. *Laws*, 90 App. D. C.

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105, 194 F. 2d 873; R. 37-40). Upon remand the District Court after hearing further argument, dismissed the complaint stating in a memorandum opinion that the action was barred by res judicata by virtue of the earlier denials in 1942 and 1945 of the motions for relief by the United States Court of Appeals for the Second Circuit (R. 41-46).

An appeal to the United States Court of Appeals for the District of Columbia was taken and that court affirmed the decision of the District Court, although for entirely different reasons (R. 51-56). It stated that the original complaint set forth a cause of action based upon the bribery of Judge Manton, which was discovered more than three years prior to the time this suit was instituted, and that the 1950 amendment to the complaint, which specifically charged the defendant with fraud during the subsequent proceedings in 1942 and 1945 before the Court of Appeals, could not be related back to the original complaint since it set forth a new and distinct cause of action. Since the amendment was filed more than three years after the last frauds therein alleged, the court held that this action was barred by the District of Columbia statute of limitations (District of Columbia Code, Title 12, Section 201).

REASONS FOR GRANTING THE WRIT

1. In deciding that the District of Columbia statute of limitations was applicable to a proceeding of this type, the Court of Appeals decided an important question of Federal law which has not been, but which should be, settled by this Court and acted in a way which is in conflict with related decisions of this Court.

The Court of Appeals held that petitioner's cause of action was barred by the three year District of Columbia

Statute of Limitations. The propriety of the use of a local statute of limitations to bar a proceeding of this nature raises a question of wide application not heretofore decided by this Court and seemingly in conflict with related decisions of this Court.

Rule 60(b) of the Federal Rules of Civil Procedure prescribes the methods and the general bases for obtaining relief from judgments of a Federal Court. Where a claim of fraud upon the court is made, two modes of relief are there provided; the first being a motion to the court in which the fraud was perpetrated; the second being an independent action for relief. If an independent action is brought, the action need not be begun in the court which rendered the contested judgment (Notes of Advisory Committee on Amendments to Rules, 28 U. S. C. A. following Rule 60). One of the issues raised by the decision in this case is whether in determining the timeliness of the action, the Federal Court in which the independent action is begun should apply the general Federal doctrine of laches or the local statute of limitations.

A somewhat similar problem was presented to this court in *Holmberg* v. *Armbrecht*, 327 U. S. 392. In that case a suit of an equitable nature was brought in a Federal Court to enforce liability on the holder of bank stock under the Federal Farm Loan Act. This Court held that the state statute of limitations, which would have barred the proceeding, was inapplicable and that the Federal doctrine of laches should be used to determine whether the suit was timely. The Court stated at p. 394:

> "The considerations that urge adjudication by the same law in all courts within a state when enforcing a right created by that state are hardly relevant for determining the rules which bar enforcement of an

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> equitable right created not by a state legislature but by Congress. . . . When Congress leaves to the Federal courts the formulation of remedial details, it can hardly expect them to break with historic principles of equity in the enforcement of federally created equitable rights."

The case of *Guarantee Trust Co.* v. *York,* 326 U. S. 99, was expressly held inapplicable since in that case although the action was begun in a Federal court, the sole basis of Federal jurisdiction was diversity of citizenship and purely state created rights were involved.

It is submitted that the reasoning of the Court in *Holmberg* v. *Armbrecht, supra,* is fully applicable here. If a defrauded party seeks relief in a Federal court from a judgment of a Federal court pursuant to Rule 60(b), his right to obtain such relief should not be determined solely by the local law of the forum in which he may bring his action for relief. The relief to which a party is entitled under Rule 60(b) should be the same in every Federal court. The only way to achieve such uniformity throughout the Federal courts is to apply a general doctrine of laches rather than the particular period of limitations in effect in the forum in which the suit is commenced.

A motion to a Federal court to relieve a party from the burdens of a prior judgment rendered by that court which was procured through a fraud upon that court may be made at any time. *Hazel-Atlas Glass Co.* v. *Hartford Empire Co.,* 322 U. S. 238. There is patently no logical basis for permitting the same court in which the fraud was perpetrated to act without the restriction of a local statute of limitations and at the same time to prevent other Federal courts from giving similar relief as contemplated in Rule 60(b) because of a local statute of limitations. Rule 60(b)

gives to litigants in a Federal court certain important rights which should not be and cannot be thwarted by local rules.

In *Hazel-Atlas Glass Co.* v. *Hartford Empire Co., supra,* this Court permitted a judgment to be upset nine years after it had been rendered and despite the fact that the petitioner did not exercise the highest degree of diligence because the fraud complained of—a fraud upon the court—was such a serious and permeating wrong in that it involved not merely private rights but the integrity of the judicial system itself. The fraud alleged in the instant case is far more more vicious that that which occurred in the *Hazel-Atlas* case. If the lack of diligence of the complainant in that case was found not to be sufficient to preclude punishment for the fraud fifteen years after it had been first practiced and nine years after it had been relied upon by the court, certainly a local three year statute of limitations should not preclude similar relief here.

Counsel has been able to find no decisions of this Court or the Courts of Appeals resolving the question of what law is to be applied in independent actions which are commenced to secure the relief prescribed in Rule 60(b). Cf. *Griffith* v. *Bank of New York,* 147 F. 2d. 899 (2 Cir. 1945), certiorari denied, 325 U. S. 874 (state procedure for setting aside a judgment not controlling where action brought in Federal court). It is urged that certiorari be granted in this case in order that this question may be resolved.

2. The decision of the Court of Appeals with respect to the application of Rule 15(c) of the Federal Rules of Civil Procedure is in conflict with the decisions of other Circuit Courts of Appeals on the same matter.

Even if the local three year statute of limitations is believed applicable, it is submitted that the Court of Appeals

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misinterpreted Rule 15(c) of the Federal Rules of Civil Procedure, and rendered a decision in conflict with the decisions of other United States Courts of Appeals.

The Court of Appeals held that the amendment to the complaint set forth a new claim and therefore was not entitled to relation back pursuant to Rule 15(c). The court admitted that the conduct described in the amendment was motivated by, grew out of, and was intended to conceal the fraud alleged in the original complaint (R. 56). But relying upon the language of the Court of Appeals for the Tenth Circuit in *L. E. Whitham Construction Co.* v. *Remer,* 115 F. 2d. 371 (10 Cir. 1939), that "The Rule is not applicable where the amendment introduces a different and additional claim or cause of action" (R. 54), the court refused to relate the amendment back to the date of the original pleading.

It is submitted that Rule 15(c) was designed to avoid the necessity of making the technical determination of whether a new claim or cause of action is presented by an amendment. The application of Rule 15(c) depends instead upon the answer to the practical question of whether the defendant knew at the beginning of the suit the facts which the plaintiff seeks to put into the complaint by way of amendment. See Chafee, *Broadening the Second Stage of Federal Interpleader,* 56 Harv. L. Rev. 929, 964. The facts of this case meet all of the criteria set forth by other Courts of Appeals in determining whether or not to relate amendments back. The more important of these tests laid down by the other Courts of Appeals are: (a) whether the defendant had reasonable notice that the matters set forth in the amendment were in issue; (b) whether the evidence to be introduced with respect to the amended complaint is sub-

stantially the same as that for the unamended complaint; (c) whether but a single recovery is sought; (d) whether the amendment seeks merely to amplify or clarify the complaint; (e) whether the amendment is designed merely to meet affirmative defenses to the complaint; and (f) whether the defendant is prejudiced by relating the amendment back. See *Maty* v. *Grasselli Co.*, 303 U. S. 197; *Tiller* v. *Atlantic Coast Line R. R.*, 323 U. S. 574; *Michelson* v. *Penney*, 135 F. 2d. 409 (2 Cir. 1943); *Blair* v. *Durham*, 134 F. 2d. 727 (6 Cir. 1943); *Hirshhorn* v. *Mine Safety Appliance Co.*, 101 F. Supp. 549 (W. D. Pa. 1951), affirmed 193 F. 2d. 489.

Indeed the decision of this court appears to be in direct conflict with the decision of the Court of Appeals for the Eighth Circuit in *Partin* v. *Wade*, 172 F. 2d. 50 (8 Cir. 1949). Here an amendment was related back to the date of the original pleading because the amendment met an affirmative defense by showing facts which constituted an answer to the claim made in the affirmative defense that the statute of limitations was a bar to the action. In this case what the petitioner sought to do by her amendment was to show that the defendant continued and suppressed the fraud alleged in the original complaint, thereby extending the period of limitations.

The case relied upon by the Court of Appeals (*L. E. Whitham Construction Co.* v. *Remer, supra*) has been criticized by the leading text writers as being contrary to the purpose of Federal Rule 15(c). See 1 Barron & Holtzoff, *Federal Practice and Procedure* 912; 3 *Moore's Federal Practice* 854. It is submitted that the references in that case and this to the conceptualistic issue of whether or not a new cause of action has been set forth in the amendment

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is incorrect and in conflict with the decisions of this and other courts.

It is submitted, morever, that a careful reading of the instant complaint discloses that the amendment in fact merely made more specific matters alleged in the original complaint. Petitioner charged the defendants with continuous acts of fraud in the original complaint (R. 15), and set forth affirmatively the facts about which the Court of Appeals for the Second Circuit had been misled (R. 12, 13). In the amendment, petitioner merely recited that the continuous acts of fraud consisted of submitting false affidavits to the Court of Appeals on those matters (R. 17).

Clearly, the interpretation of Rule 15(c) as established by this Court and other Courts of Appeals required the application of the doctrine of relation back under such circumstances.

3. The Action Is Not Barred By Res Judicata.

In view of the Court of Appeals' holding on the statute of limitations, it was unnecessary for that court to consider the correctness of the District Court's determination that the instant proceeding was barred by the doctrine of *res judicata*. This question is vital to the interpretation of Rule 60(b) and has not yet been passed upon by this Court or by the Courts of Appeals.

As already indicated, Rule 60(b) provides that relief in certain situations may be obtained by either a motion to the court in which the decision was made, or by an independent action. One of the issues involved in this case is whether resort to a motion precludes a later resort to an independent action.

It is submitted that if the court to which the motion was addressed did not proceed to adjudicate the validity of the charge made on the motion by hearing witnesses and proof, the denial of the motion should not preclude resort to a later independent proceeding for relief. In *Hazel-Atlas Glass Co.* v. *Hartford Empire Co., supra,* this Court noted that:

> "We do not hold and would not hold that the material questions of fact raised by the charges of fraud against Hartford could, if in dispute, be finally determined on *ex parte* affidavits without examination and cross-examination of witnesses." *Id.* at 248.

Not every disposition of a motion precludes a party from obtaining relief in equity. See *Freeman on Judgments,* Section 1198 (Fifth Ed. 1925). This is especially true of motions of the type here involved where the relief requested lies within the discretion of the court. See *Griffith* v. *Bank of New York, supra.*

Furthermore, the petitioner has charged the defendant with fraud in the course of the motions, and this alone would be sufficient to avoid the doctrine of *res judicata. United States* v. *Atherton,* 102 U. S. 372.

The California courts in construing section 473 of the California Code of Civil Procedure, from which Rule 60(b) was copied, have held that relief by motion and independent action are distinct and cumulative, and resort to one does not preclude resort to the other. *Estudillo* v. *Security Loan & Trust Co.,* 149 Cal. 556, 87 Pac. 19; *Baker* v. *Baker,* 217 Cal. 216, 18 P. 2d 61; *Gump* v. *Gump,* 42 Cal. App. 2d 64, 108 P. 2d 21.

It is submitted that the District Court erred in this respect and that Rule 60(b) should be applied consistently with the theory of this Court in *Hazel-Atlas Glass Co.* v.

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Hartford Empire Co., supra, and with the California decisions interpreting the rule from which it was copied.

4. Actions Based Upon Fraud Upon a Court Are Unique And Are Entitled To The Utmost Liberality.

For purposes of this proceeding, it is admitted that the defendant bribed a United States Judge and thereby secured a decision favorable to it in a very important case. At stake is the very integrity of the administration of justice.

It is submitted that the language of this Court in the case of *Holmberg* v. *Armbrecht*, 327 U. S. 392, is most pertinent:

> "Traditionally and for good reasons, statutes of limitation are not controlling measures of equitable relief. Such statutes have been drawn upon by equity solely for the light they may shed in determining that which is decisive for the chancellor's intervention, namely, whether the plaintiff has inexcusably slept on his rights so as to make a decree against the defendant unfair.
>
> "Equity eschews mechanical rules; it depends on flexibility. Equity has acted on the principle that 'laches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties'. . . . And so, a suit in equity may lie though a comparable cause of action at law would be barred. If want of due diligence by the plaintiff may make it unfair to pursue the defendant, fraudulent conduct on the part of the defendant may have prevented the plaintiff from being diligent and may make it unfair to bar appeal to equity because of mere lapse of time.
>
> "Equity will not lend itself to such fraud and historically has relieved from it. It bars a defendant

from setting up such a fraudulent defense, as it interposes against other forms of fraud."

Relief from fraud is one of the primary bases for the invocation of equity. As was stated in *Skelly Oil Co.* v. *Universal Oil Products Co.*, 338 Ill. App. 79, 86 N. E. 2d 875, "Courts should not be helpless to find a remedy for a fraud of the instant type. If the statute fails to provide a remedy, the court can, as it has in many instances under the common law and equitable principles".

The petitioner has acted with far more diligence than did the petitioner in *Hazel-Atlas Glass Co.* v. *Hartford Empire Co.* If the court was willing in that case to overlook the petitioner's lack of diligence in order to erase a stain upon the court's integrity, certainly under principles of equity a similar result should have been reached in this proceeding.

It is submitted that there is no instance where it would be more appropriate for a court to exercise every effort to overcome a mechanical construction of a statute of limitations than in a situation such as this, where the defendant has corrupted a Federal Judge and has thereafter resorted to active affirmative concealment of that act by the use of false and fraudulent affidavits. Time should not be permitted to aid such a wrongdoer. *Root Refining Co.* v. *Universal Oil Products Co.*, 169 F. 2d 514 (3 Cir. 1948).

This case has had a long and tortured history. The questions presented by it are not simple. But as the case is now presented to this Court, the fraud of the defendant is admitted. Surely good conscience cannot allow such a fraud to stand. *Marshall* v. *Holmes*, 141 U. S. 589; *Publicker* v. *Shallcross*, 106 F. 2d 949 (3 Cir. 1939), cert. denied, 308 U. S. 624.

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CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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December 8, 1953.